

# Order

Michigan Supreme Court  
Lansing, Michigan

February 23, 2006

Clifford W. Taylor,  
Chief Justice

ADM File No. 2003-47

Michael F. Cavanagh  
Elizabeth A. Weaver  
Marilyn Kelly  
Maura D. Corrigan  
Robert P. Young, Jr.  
Stephen J. Markman,  
Justices

Proposed Administrative Order  
Regarding Asbestos-Related  
Disease Litigation

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On order of the Court, upon consideration of the petition of certain interested parties in asbestos-related disease litigation, this is to advise that the Court is considering adopting a proposed administrative order regarding asbestos-related disease litigation (see Alternatives A and B below). Before determining whether either proposal should be adopted, changed before adoption, or rejected, this notice is given to afford interested persons the opportunity to comment on the form or the merits of the proposal or to suggest alternatives. The Court welcomes the views of all. This matter also will be considered at a public hearing. The notices and agendas for public hearings are posted at [www.courts.michigan.gov/supremecourt](http://www.courts.michigan.gov/supremecourt).

Publication of these alternative proposals does not mean that the Court will issue an order on the subject, nor does it imply probable adoption of the proposal in its present form.

## **ALTERNATIVE A**

1. This order applies to all asbestos-related disease personal injury actions pending or to be filed in Michigan courts. For purposes of this order, "asbestos-related disease personal injury actions" include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery. Until the transfer of the action under paragraph 2 of this order, the parties to such an action shall include the words "Asbestos Case" on the top right-hand corner of the first page of any papers subsequently filed in the action.
2. Each court in which an asbestos-related disease personal injury action is pending shall enter an order changing venue of the action to the Third

Judicial Circuit within 14 days of the date of this order. Upon the filing of a new asbestos-related disease personal injury action, the court shall enter an order changing venue to the Third Judicial Circuit within 14 days after the action is filed. The court shall send a copy of the order to the State Court Administrator. A party who objects to the transfer of an action under this paragraph may raise the objection by filing a motion in the Third Judicial Circuit. Such a motion must be filed within 14 days after the transfer of the action.

3. Proceedings in each action transferred under this order shall be conducted in accordance with orders as may be entered by the Third Judicial Circuit. Orders entered by the court in which the action was originally filed that are inconsistent with orders entered by the Third Judicial Circuit are superseded. The Third Judicial Circuit shall cooperate with the State Court Administrator in monitoring the proceedings in the actions.
4. If discovery proceedings have been conducted in an action before a transfer under this order, those discovery materials remain part of the record in the action in which they were produced, and may be used in further proceedings where otherwise appropriate notwithstanding the transfer under this rule.
5. All cases transferred to or filed in the Third Judicial Circuit shall be placed either on the active or inactive docket. A case shall be placed on the active docket only if one of the following occurs:
  - (a) The plaintiff files an affidavit of a physician stating that the person whose alleged injury forms the basis for the action, including a decedent in a wrongful death action, has been diagnosed with mesothelioma, lung cancer, or some other malignancy as a result of exposure to asbestos; or
  - (b) The plaintiff files materials satisfying the ABA standard for nonmalignant asbestos-related disease claims (February 2003) as follows:
    - I. The filing of any civil action alleging personal injury for asbestos-related nonmalignant disease must be accompanied by a detailed

narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:
  - a. A detailed occupational and exposure history from the person (claimant) whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and
  - b. A detailed medical and smoking history that includes a thorough review of the claimant's past and present medical problems, and their most probable cause.
2. Sets out the details of the occupational, medical, and smoking history, and verifies that at least 15 years have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.
3. Verifies that the claimant has:
  - a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader

according to the International Labor Office (ILO) system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or

- b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases*, Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).
4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and technique that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th ed) and reported as set forth in 20 CFR 404, Subpt P, App 1, Part (A) § 3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am Rev Resp Dis 1991;144:1202-1218 that shows:
- a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or
  - b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.
  - c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board-certified pulmonologist, internist, or occupational physician that states:

- 1) That the doctor has a doctor-patient relationship with the claimant; and
  - 2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and
  - 3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and
  - 4) That the physician shall submit the reports and readouts from all pulmonary function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality, and reporting standards set forth herein.
5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.
- II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be filed with the court and served on all other parties. Failure to do so,

or demonstration by any party that the reports do not satisfy the standards set forth herein, shall result in the case being placed on or transferred to the inactive docket.

6. For cases on the inactive docket, no further proceedings shall occur and no discovery shall be ordered, although the parties may voluntarily engage in discovery. A case shall remain on the inactive docket until one of the following occurs:
  - (a) The case is transferred to the active docket upon motion of a party and satisfaction of the requirements of paragraph 5;
  - (b) The case is dismissed by stipulation of the parties; or
  - (c) The case is dismissed by order on the court's own motion, or on motion of a party, after notice to all parties and an opportunity to be heard.
7. For cases on the active docket, after the close of discovery, the Third Judicial Circuit shall conduct a settlement conference or conferences. If settlement is not reached as to all claims, the Third Judicial Circuit shall enter an order changing venue to the court in which the action was originally filed, or if appropriate to some other court, for further proceedings. A copy of the order shall be sent to the State Court Administrator. Cases on the active docket shall not be joined with cases from the inactive docket for settlement or any other purpose.
8. MCR 2.222, MCR 2.223, and MCR 2.224 do not apply to changes of venue pursuant to this order.

Staff Comment: The proposed Administrative Order provides for consolidation of all asbestos-related disease personal injury actions in the Third Judicial Circuit. It further provides for active and inactive dockets, based on the severity of the alleged injury, as measured in part by the February 2003 American Bar Association standard for nonmalignant asbestos-related disease claims.

The staff comment is not an authoritative construction by the Court.

#### **ALTERNATIVE B**

1. This order applies to all asbestos-related disease personal injury actions pending or to be filed in Michigan courts. For purposes of this order, “asbestos-related disease personal injury actions” include all cases in which it is alleged that a party has suffered personal injury caused by exposure to asbestos, regardless of the theory of recovery. Until the transfer of the action under paragraph 2 of this order, the parties to such an action shall include the words “Asbestos Case” on the top right-hand corner of the first page of any papers subsequently filed in the action.
2. Each court in which an asbestos-related disease personal injury action is pending shall enter an order changing venue of the action to the Third Judicial Circuit within 14 days of the date of this order. Upon the filing of a new asbestos-related disease personal injury action, the court shall enter an order changing venue to the Third Judicial Circuit within 14 days after the action is filed. The court shall send a copy of the order to the State Court Administrator. A party who objects to the transfer of an action under this paragraph may raise the objection by filing a motion in the Third Judicial Circuit. Such a motion must be filed within 14 days after the transfer of the action.
3. Proceedings in each action transferred under this order shall be conducted in accordance with orders as may be entered by the Third Judicial Circuit. Orders entered by the court in which the action was originally filed that are inconsistent with orders entered by the Third Judicial Circuit are superseded. The Third Judicial Circuit shall cooperate with the State Court Administrator in monitoring the proceedings in the actions.
4. If discovery proceedings have been conducted in an action before a transfer under this order, those discovery materials remain part of the record in the action in which they were produced, and may be used in further proceedings where otherwise appropriate notwithstanding the transfer under this rule.
5. All cases transferred to or filed in the Third Judicial Circuit shall be classified as either Tier I or Tier II cases. A case shall be classified as Tier I only if one of the following occurs:
  - (a) The plaintiff files a medical report or affidavit of a physician stating that the person whose alleged injury forms the basis for the action, including a decedent in a wrongful death action, has been diagnosed

with mesothelioma, lung cancer, or some other malignancy as a result of exposure to asbestos; or

- (b) The plaintiff files materials satisfying the ABA standard for nonmalignant asbestos-related disease claims (February 2003) as follows:

- I. The filing of any civil action alleging personal injury for asbestos-related nonmalignant disease must be accompanied by a detailed narrative Medical Report and Diagnosis signed by the diagnosing doctor, that:

1. Verifies that the doctor or a medical professional employed by and under the direct supervision and control of the diagnosing doctor has taken:

- a. A detailed occupational and exposure history from the person (claimant) whose alleged injury forms the basis for the action or, if that person is deceased, from the person most knowledgeable about the exposures that form the basis for the action. The history shall include all of the principal employments and exposures of the claimant involving exposures to airborne contaminants. It should indicate whether each employment involved exposure to airborne contaminants (including, but not limited to, asbestos fibers, and other disease causing dusts) that can cause pulmonary impairment and the nature, duration, and level of any such exposure; and

- b. A detailed medical and smoking history that includes a thorough review of the claimant's past and present medical problems, and their most probable cause.

2. Sets out the details of the occupational, medical, and smoking history, and verifies that at least 15 years



have elapsed between the claimant's first exposure to asbestos and the time of diagnosis.

3. Verifies that the claimant has:
  - a. A quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the International Labor Office (ILO) system of classification as showing bilateral small irregular opacities (s, t, or u) graded 1/0 or higher or bilateral diffuse pleural thickening graded b2 or higher including blunting of the costophrenic angle; or
  - b. Pathological asbestosis graded 1(B) or higher under the criteria published in the *Asbestos-Associated Diseases*, Special Issue of the Archives of Pathology and Laboratory Medicine, Volume 106, Number 11, Appendix 3 (October 8, 1982).
4. Verifies that the claimant has asbestos-related pulmonary impairment as demonstrated by Pulmonary Function Testing, performed using equipment, methods of calibration and techniques that meet the criteria incorporated in the AMA Guides to the Evaluation of Permanent Impairment (5th ed) and reported as set forth in 20 CFR 404, Subpt P, App 1, Part (A) § 3.00 (E) and (F), and the interpretative standards set forth in the Official Statement of the American Thoracic Society entitled "Lung Function Testing: Selection of Reference Values And Interpretative Strategies" as published in Am Rev Resp Dis 1991;144:1202-1218 that shows:

- a. Forced Vital Capacity below the lower limit of normal and FEV1/FVC ratio (using actual values) at or above the lower limit of normal; or
- b. Total Lung Capacity, by plethysmography or timed gas dilution, below the lower limit of normal.
- c. Where the Pulmonary Function Test results do not meet the requirements of (a) or (b), above, a claimant may submit an additional report, by a board-certified pulmonologist, internist, or occupational physician that states:
  - 1) That the doctor has a doctor-patient relationship with the claimant; and
  - 2) That the claimant has a quality 1 chest x-ray taken in accordance with all applicable state and federal regulatory standards (in a death case where no pathology is available, the necessary radiologic findings may be made with a quality 2 film if a quality 1 film is not available), and that the x-ray has been read by a certified B-reader according to the ILO system of classification as showing bilateral small irregular opacities (s, t, or u) graded 2/1 or higher; and
  - 3) That the claimant has restrictive impairment from asbestosis and sets forth in detail the specific pulmonary function test findings that the doctor relies upon to establish that the claimant has restrictive impairment; and
  - 4) That the physician shall submit the reports and readouts from all pulmonary

function, lung volume, diffusing capacity, or other testing relied upon for the report's conclusions. Such tests must comply with the equipment, quality, and reporting standards set forth herein.

5. Verifies that the doctor has concluded that the claimant's medical findings and impairment were not more probably the result of other causes revealed by claimant's employment and medical history.

II. Copies of the B-reading, the pulmonary function tests (including printouts of the flow volume loops and all other elements required to demonstrate compliance with the equipment, quality, interpretation, and reporting standards set forth herein) and the diagnosing physician's detailed narrative Medical Report and Diagnosis shall be filed with the court and served on all other parties. Failure to do so, or demonstration by any party that the reports do not satisfy the standards set forth herein, shall result in the case being classified as a Tier II case.

6. All Tier I cases shall be resolved independently, either by judgment or dispositive order, before any Tier II case may be docketed for further proceedings, although the parties in a Tier II case voluntarily may engage in discovery.
7. A plaintiff in a Tier II case may voluntarily place his or her case on an inactive docket. For cases on the inactive docket, no further proceedings shall occur and no discovery shall be ordered, although the parties may voluntarily engage in discovery. A case shall remain on the inactive docket until one of the following occurs:
  - (a) The case is transferred to the active docket upon motion of a party;
  - (b) The case is dismissed by stipulation of the parties; or
  - (c) The case is dismissed by order on the court's own motion, or on motion of a party, after notice to all parties and an opportunity to be heard.

8. For cases on the active docket, after the close of discovery, the Third Judicial Circuit shall conduct a settlement conference or conferences. If settlement is not reached as to all claims, the Third Judicial Circuit shall enter an order changing venue to the court in which the action was originally filed, or if appropriate to some other court, for further proceedings. A copy of the order shall be sent to the State Court Administrator. Cases on the active docket shall not be joined with cases from the inactive docket for settlement or any other purpose.
9. MCR 2.222, MCR 2.223, and MCR 2.224 do not apply to changes of venue pursuant to this order.

Staff Comment: The proposed Administrative Order provides for consolidation of all asbestos-related disease personal injury actions in the Third Judicial Circuit. It further provides for active and voluntary inactive dockets, based on the severity of the alleged injury, as measured in part by the February 2003 American Bar Association standard for nonmalignant asbestos-related disease claims.

The staff comment is not an authoritative construction by the Court.

A copy of this order will be given to the Secretary of the State Bar and to the State Court Administrator so that they can make the notifications specified in MCR 1.201. Comments on these proposals may be sent to the Supreme Court Clerk in writing or electronically by June 1, 2006, at P.O. Box 30052, Lansing, MI 48909, or [MSC\\_clerk@courts.mi.gov](mailto:MSC_clerk@courts.mi.gov). When filing a comment, please refer to ADM File No. 2003-47. Your comments and the comments of others will be posted at [www.courts.mi.gov/supremecourt/resources/administrative/index.htm](http://www.courts.mi.gov/supremecourt/resources/administrative/index.htm).



I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

February 23, 2006

*Corbin R. Davis*

Clerk